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Discussion Paper on Proposed Limitations Act

September, 1977

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Proposed Limitations Act

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PREFACE

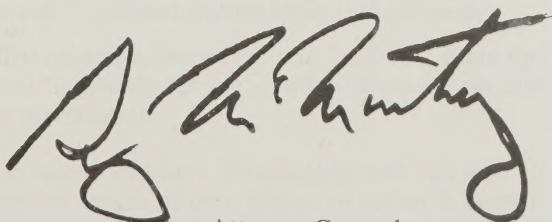
There are no areas of statute law which are in greater need of major legislative reform than the law governing the limitation of actions. Our present Limitations Act is a collection of provisions drawn from 13 English statutes enacted between 1588 and 1888. The meaning of the present Ontario Act is obscure, its language archaic and its substance out of harmony with modern conditions. The result can be said to be nothing less than chaotic.

In 1969 the Ontario Law Reform Commission published its Report on Limitation of Actions. It is widely recognized that the recommendations contained in that Report provide a rational coherent approach to dealing with the Limitation of Actions. This Discussion Paper contains a draft of a Proposed Limitations Act based in large measure on the recommendations contained in that Report.

The Draft Proposed Act contained in this Paper departs from the Ontario Law Reform Commission recommendations in instances where developments in the law of limitations of other jurisdictions subsequent to 1969, if implemented, would result in better legislation. The Draft Proposed Act also departs from the Commission recommendations where there is a significant opportunity to achieve uniformity of limitations law in Canada without sacrifice of basic principles.

It has long been accepted that there is a need for a high degree of uniformity in the limitations law applicable in the provinces of Canada. In 1975, the province of British Columbia enacted a new Limitations Act which follows an approach very similar to that recommended by the Ontario Law Reform Commission. In the interest of uniformity, the Draft Proposed Limitations Act is modeled closely, both in structure and wording, on the British Columbia statute. While there are some departures from the British Columbia Limitations Act, I believe that the British Columbia-Ontario approach might serve as a new model for uniform limitations legislation in Canada.

In my opinion, it is most desirable that those who will be vitally affected by a change in limitations of actions should have the opportunity to carefully examine the Draft Proposed Act. Comments and suggestions for improvements to the proposed legislation are most welcome. In order to permit the early introduction for enactment of a Limitations Act, comments and suggestions should be sent to this Ministry by December 31, 1977.



Attorney General

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INTRODUCTION

The concept of a statute of limitations is familiar to most persons. It is widely known that persons are required to commence law suits within specific times in order to preserve their rights against potential defendants. The function of a limitation period is to bar the bringing of a law suit after a specific length of time has passed from the alleged occurrence of events which, if those events could be proved, would amount to a cause of action.

The underlying policy behind the limitation of actions is stated at pages 9 and 10 of the Ontario Law Reform Commission Report on Limitation of Actions:

Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die; documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of peace" . . .

Apart from the protection they give to potential defendants, limitation statutes enable the courts to function more effectively by ensuring that litigation is not started so long after the event that there are likely to be evidential difficulties. In addition, the commercial world is able to carry on more smoothly. The limitation statutes encourage early settlements so that the disrupting effect of unsettled claims on commercial intercourse is minimized.

The Draft Proposed Act is designed to remedy the six important problems in Ontario's present legislation:

1. The present limitation periods are inappropriate to modern conditions;
2. There are difficulties with regard to the time at which limitation periods begin to run, and with respect to the extension of time;
3. There are far too many special limitation periods;
4. Some of the language in the present statute is archaic;
5. Only some provisions of the present statute apply to the Crown;
6. Under current land transaction procedure and land use, there appears to be little need to provide for the creation of easements and *profits-à-prendre* by prescription.

In a sense, all limitation laws are arbitrary. Reasonable men can and do disagree on the most appropriate length of time before an action is barred. They disagree on the most suitable methods for preventing the hardship that

limitation of actions can cause to those whose rights or remedies are barred by them. It is believed that the Draft Proposed Act is a rational scheme designed to fill the need for a modern limitations statute. It is impossible in a Discussion Paper of modest size to explain the reasoning underlying the provisions. Those who desire to gain a deeper understanding of the issues should consult the 1969 Ontario Law Reform Commission Report on Limitation of Actions and the 1974 Law Reform Commission of British Columbia Report on Limitations, Part 2, General.

This Discussion Paper contains: a Draft of a Proposed Limitations Act; Other Complementary Legislation; a Summary of the Ontario Law Reform Commission Recommendations, and; a Synopsis of Major Departures from the Ontario Law Reform Commission Recommendations.

Discussion Draft of Proposed Act

The Limitations Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. In this Act,

Interpre-
tation

- (a) "action" includes any proceeding in a court and any exercise of a self-help remedy;
- (b) "collateral" means property that is subject to a security interest;
- (c) "court" means a court of law created by the Legislature of Ontario with jurisdiction to hear and determine actions, and the Supreme Court of Canada hearing an appeal from an Ontario court;
- (d) "judgment" means a judgment or order of a court, or an award pursuant to an arbitration to which *The Arbitrations Act* applies;
- (e) "secured party" means a person who has a security interest;
- (f) "security agreement" means an agreement that creates or provides for a security interest;
- (g) "security interest" means an interest in collateral that secures payment or performance of an obligation;
- (h) "trust" includes express, implied and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative, but does

R.S.O. 1970,
c. 25

not include the duties incident to the estate or interest of a secured party in collateral. R.S.O. 1970, c. 246, s. 1, *amended*.

No interference with certain rules of equity and laws

2. Nothing in this Act,

- (a) interferes with a rule of equity that refuses relief, on the grounds of acquiescence, to a person whose right to bring an action is not barred by virtue of this Act;
- (b) interferes with a rule of equity that refuses relief, on the ground of laches, to a person claiming equitable relief in aid of a legal right, whose right to bring the action is not barred by virtue of this Act; or
- (c) interferes with any rule or law that establishes a limitation period, or otherwise refuses relief, with respect to proceedings by way of judicial review of the exercise of statutory powers. R.S.O. 1970, c. 246, s. 2, *amended*.

Limitation periods, 2 years

3.—(1) The following actions shall not be brought after the expiration of two years after the date on which the right to do so arose,

- (a) an action for damages in respect of injury to person or property, including economic loss arising therefrom, whether based on contract, tort, or statutory duty;
- (b) an action for trespass to property not included in clause a;
- (c) an action for defamation;
- (d) an action for false imprisonment;
- (e) an action for malicious prosecution;
- (f) an action for seduction;
- (g) an action under *The Fatal Accidents Act*;
- (h) an action against the Registrar of Motor Vehicles under *The Motor Vehicles Accident Claims Act*;
- (i) a civil action by the Crown or any person to recover a fine or other penalty imposed under any Act.

R.S.O. 1970, c. 164

R.S.O. 1970, c. 281

(2) The following actions shall not be brought after the expiration of ten years after the date on which the right to do so arose, ^{Idem. 10 years}

- (a) an action against the personal representatives of a deceased person for a share of the estate;
- (b) an action against a trustee in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy;
- (c) an action against a trustee for the conversion of trust property to the trustee's own use;
- (d) an action to recover trust property or property into which trust property can be traced against a trustee or any other person;
- (e) an action to recover money on account of a wrongful distribution of trust property against the person in whom the property is distributed, or a successor;
- (f) an action on a judgment for the payment of money or the return of personal property;
- (g) an action for possession of land where the person entitled to possession of the land has been dispossessed in circumstances amounting to trespass;
- (h) an action for possession of land by a person who has a right to enter for breach of a condition subsequent, or a right to possession arising under a possibility of reverter in respect of a determinable interest.

(3) The following actions are not governed by any limitation period and may be brought at any time, ^{Idem. no limitation}

- (a) an action by a debtor in possession of collateral to redeem that collateral;
- (b) an action by a secured party in possession of collateral to realize on that collateral;
- (c) an action relating to the enforcement of an injunction or a restraining order;
- (d) an action to enforce an easement, restrictive covenant, or *profit-à-prendre*;

- (e) an action for a declaration as to personal status;
- (f) an action for or declaration as to the title to property by any person in possession of that property.

Idem,
6 years

(4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of six years after the date on which the right to do so arose.

Idem,
6 years

(5) Without limiting the generality of subsection 4 and notwithstanding subsections 1 and 3, the following actions shall not be brought after the expiration of six years after the date on which right to do so arose,

- (a) an action by a secured party not in possession of collateral to realize on that collateral;
- (b) an action by a debtor not in possession of collateral to redeem that collateral;
- (c) an action for damages for conversion or detention of goods;
- (d) an action for the recovery of goods wrongfully taken or detained;
- (e) an action to realize on a foreign judgment.

Rights of
benefi-
ciaries

(6) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action or other proceeding and this section had been pleaded.

"debtor"
defined

(7) In subsections 3 and 5, "debtor" means a person who owes payment or other performance of an obligation secured, whether or not he owns or has rights to the collateral.

Accrual
of causes
of action

(8) In actions that are based on the breach of a duty to take care, whether the duty arises in tort, contract or by statute, time, for the purposes of this Act, runs from the occurrence of the damage, but in all other cases the common law rules respecting the accrual of causes of action apply as though this Act had not been passed.

Idem,
R.S.O. 1970,
c. 164

(9) In actions under *The Fatal Accidents Act*, time for the purposes of this Act runs from the day on which the death occurred.

(10) In actions against the Registrar of Motor Vehicles under *The Motor Vehicle Accident Claims Act*, time for the purposes of this Act runs from the day on which the death, personal injury, loss or property damage occurred.

Idem.
R.S.O. 1970,
c. 281

(11) The limitation period fixed by this Act with respect to an action relating to an interest of a beneficiary in trust property does not commence to run against him until that interest becomes an interest in possession.

Interest of
benefi-
ciary in
trust
property

4.—(1) Any claim by way of set-off, counterclaim, the adding of parties, or third party proceedings shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is made, or the parties added, or the third party proceedings are taken.

Set-offs,
counter-
claims,
adding
parties, and
third party
proceedings

(2) Where an action is commenced against a tortfeasor or where a tortfeasor settles with a person who has suffered damage as a result of a tort, within the period of limitation prescribed for the commencement of actions by any relevant statute, no proceedings for contribution or indemnity against another tortfeasor are defeated by the operation of any statute limiting the time for the commencement of action against such other tortfeasor if,

Limitation
of actions

(a) such proceedings are commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and

(b) there has been compliance with any statute requiring notice of claim against such tortfeasor.

(3) The court in any action pending in that court may allow an application for the amendment of any pleading or for a change of party, upon such terms as to costs or otherwise as the court considers just, notwithstanding that during the period of time between the issue of the writ and the application for amendment or change of party any fresh cause of action disclosed by the amendment or the cause of action against the new party became barred by a limitation provision.

Amendment
of pleadings
and changes
of parties

5.—(1) Where, after time has commenced to run with respect to a limitation period fixed by this Act but before the expiration of the limitation period, a person against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation

Confirmation
of cause of
action

period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.

Idem

(2) For the purposes of this section,

(a) a person confirms a cause of action only if he,

(i) acknowledges a cause of action, right, or title of another, or

(ii) makes a payment in respect of a cause of action, right, or title of another;

(b) an acknowledgment of a judgment or debt has effect,

(i) whether or not a promise to pay can be implied therefrom, and

(ii) whether or not it is accompanied by a refusal to pay;

(c) a confirmation of a cause of action to recover interest on principal money operates also as a confirmation of a cause of action to recover the principal money; and

(d) a confirmation of cause of action to recover income falling due at any time operates also as a confirmation of a cause of action to recover income falling due at a later time on the same amount.

Idem

(3) Where a secured party has a cause of action to realize on collateral,

(a) a payment to him of principal or interest secured by the collateral; or

(b) any other payment to him in respect of his right to realize on the collateral, or any other performance by the other person of the obligation secured,

is a confirmation by the payer or performer of the cause of action.

Idem

(4) Where a secured party is in possession of collateral,

(a) his acceptance of a payment to him of principal or interest secured by the collateral; or

(b) his acceptance of,

(i) payment to him in respect of his right to realize on the collateral, or

(ii) any other performance by the other person of the obligation secured,

is a confirmation by him to the payer or performer of the payer's or performer's cause of action to redeem the collateral.

(5) For the purposes of this section, an acknowledgment must be in writing and signed by the maker. Form of acknowledgment

(6) For the purpose of this section, a person has the benefit of a confirmation only if the confirmation is made to him or to a person through whom he claims, or if made in the course of proceedings or a transaction purporting to be pursuant to the *Bankruptcy Act* (Canada). Where benefit of confirmation lies
R.S.C. 1970,
c. B-4

(7) For the purposes of this section, a person is bound by a confirmation only if, Who is bound by confirmation

(a) he is a maker of the confirmation;

(b) after the making of the confirmation, he becomes, in relation to the cause of action, a successor of the maker;

(c) the maker is, at the time when he makes the confirmation, a trustee, and the first-mentioned person is at the date of the confirmation or afterwards becomes a trustee of the trust of which the maker is a trustee; or

(d) he is bound under subsection 8.

(8) Where a person who confirms a cause of action, Extent of confirmation in certain cases

(a) to recover property;

(b) to enforce an equitable estate or interest in property;

(c) to realize on collateral;

(d) to redeem collateral;

(e) to recover principal money or interest secured by a security agreement, by way of the appointment of a receiver of collateral or of the income or profits of collateral or by way of sale, lease, or other disposition of collateral or by way of other remedy affecting collateral; or

(f) to recover trust property or property into which trust property can be traced,

is on the date of the confirmation in possession of the property or collateral, the confirmation binds any person in possession during the ensuing period of limitation, not being, or claiming through, a person other than the maker who is, on the date of the confirmation, in possession of the property or collateral.

Effect of
confirmation
by or to
agent

(9) For the purposes of this section, a confirmation made by or to an agent has the same effect as if made by or to the principal.

Operation
of section

(10) Except as otherwise provided in this section, nothing in this section operates to allow confirmation of an unliquidated sum or to make any right, title, or cause of action capable of being confirmed that was not capable of being confirmed before this Act came into force.

Post-
ponement
of running
of time;
breach of
trust

6.—(1) The running of time with respect to the limitation period fixed by this Act for an action,

(a) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or

(b) to recover from a trustee trust property, or the proceeds thereof, in the possession of the trustee, or previously received by the trustee and converted to his own use,

is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion, or other act of the trustee upon which the action is based.

Burden of
proof

(2) For the purposes of subsection 1, the burden of proving that time has commenced to run so as to bar an action rests on the trustee.

Application
of subs. 4

(3) Subsection 4 applies only to actions,

(a) for personal injury;

- (b) for damage to property;
- (c) for professional negligence;
- (d) based on fraud or deceit;
- (e) in which material facts relating to the cause of action have been wilfully concealed;
- (f) for relief from the consequences of a mistake;
- (g) brought under *The Fatal Accidents Act*; or
- (h) for breach of trust not within subsection 1.

R.S.O. 1970.
c. 164

(4) The running of time with respect to the limitation period fixed by this Act for an action to which this subsection applies is postponed and does not commence to run against a plaintiff until he knows, or in all the circumstances of the case, he ought to know,

Post-
ponement
of running of
time: subs. 4
actions

- (a) the identity of the defendant; and
- (b) the facts upon which his action is founded.

(5) The burden of proving that the running of time has been postponed under subsection 4 is on the person claiming the benefit of the postponement.

Burden of
proof

(6) Subsections 1 and 4 do not operate to the detriment of a *bona fide* purchaser for value.

Purchasers
for value

7.—(1) For the purpose of this section, a person is under a disability,

Interpre-
tation

- (a) while he is a minor; or
- (b) while he is in fact incapable of or substantially impeded in the management of his affairs because of disease or impairment of his physical or mental condition.

(2) Where a person is under a disability at the time his right to bring an action arises, the running of time with respect to a limitation period fixed by this Act is postponed so long as that person is under a disability.

Post-
ponement
of running of
time:
disability
when cause
of action
arises

(3) Where the running of time against a person with respect to a cause of action has been postponed by subsection 2 and

Limitation
period

that person ceases to be under any disability, the limitation period governing that cause of action is the longer of,

- (a) the period which that person would have had to bring the action had that person not been under a disability, running from the time that the cause of action arose; or
- (b) such period running from the time that the disability ceased, but in no case shall that period extend more than six years beyond the cessation of disability.

Post-
ponement
of running of
time;
disability
after time
has com-
menced to run

(4) Where a person having a cause of action comes under a disability after time has commenced to run with respect to a limitation period fixed by this Act but before the expiration of the limitation period, the running of time against that person is suspended so long as that person is under a disability.

Limitation
period

(5) Where the running of time against a person with respect to a cause of action has been suspended by subsection 4 and that person ceases to be under any disability, the limitation period governing that cause of action is the longer of,

- (a) the length of time remaining to bring his action at the time the person came under the disability; or
- (b) one year from the time that the disability ceased.

Notice to
proceed

(6) Notwithstanding subsections 2 and 4, where a person under a disability has a cause of action against any other person, that other person may cause a notice to proceed to be delivered in accordance with this section, in which case time commences to run against the person under a disability as if he had ceased to be under a disability on the date the notice to proceed was delivered.

Form and
contents
of notice

(7) A notice to proceed delivered under this section must,

- (a) be in writing;
- (b) be addressed,
 - (i) in the case of a minor, to his parent or guardian, as the case may be, and a duplicate original to the Official Guardian, and

(ii) in the case of a person who comes within clause *b* of subsection 1, to his parent or committee, as the case may be, and a duplicate original to the Public Trustee;

(c) state the name of the person under a disability;

(d) specify the circumstances out of which the cause of action may arise or may be claimed to arise, with such particularity as is necessary to enable a determination to be made as to whether the person under a disability has the cause of action;

(e) give warning that the cause of action arising out of the circumstances stated in the notice is liable to be barred by this Act;

(f) state the name of the person on whose behalf the notice is delivered; and

(g) be signed by the person delivering the notice, or his solicitor.

(8) Subsection 6 does not apply to a person under a disability in bringing an action against his parent or guardian, the Official Guardian, his committee or the Public Trustee.

Where notice procedure does not apply

(9) Subsection 6 operates to benefit only those persons on whose behalf the notice is delivered and only with respect to a cause of action arising out of the circumstances specified in the notice.

Limitations of benefits

(10) The onus of proving that the running of time has been postponed or suspended under this section is on the person claiming the benefit of the postponement or suspension.

Onus of proof

(11) A notice to proceed delivered under this section is not a confirmation for the purposes of this Act and is not an admission for any purpose.

Notice is not a confirmation nor an admission

(12) The Lieutenant Governor in Council may make regulations prescribing the form, content, mode of delivery and other matters respecting a notice to proceed.

Regulations

(13) When a notice to proceed is delivered to the Official Guardian and it appears to him that the other person to whom the notice was delivered is failing to take reasonable steps to protect the interests of the minor or is otherwise acting to the minor's prejudice, the Official Guardian shall,

Duty of Official Guardian

- (a) investigate the circumstances specified in the notice; and
- (b) commence and maintain an action for the benefit of the minor if he believes that such an action would have a reasonable prospect of succeeding and would result in a judgment that would justify the bringing of the action.

Duty of
Public
Trustee

(14) Subsection 13 applies *mutatis mutandis* to the Public Trustee when a notice to proceed is delivered to him and it appears to him that the other person to whom the notice was delivered is failing to take reasonable steps to protect the interests of the person coming within clause *b* of subsection 1 or is otherwise acting to that person's prejudice.

Ultimate
limitation:
30 years

8.—(1) Subject to subsection 3 of section 3, but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6 or 7, no action to which this Act applies shall be brought after the expiration of thirty years from the date on which the right to do so arose.

Idem

(2) Subject to subsection 1, the effect of sections 6 and 7 is cumulative.

Extinguish-
ment of
right

9.—(1) Subject to subsections 2 and 3, when a limitation period prescribed by law expires and the right to bring an action is thereby barred, the cause of action upon which the action was based and any title involved are *ipso facto* extinguished.

Exception,
where time
extended

(2) Where the limitation period prescribed by law has not expired and an application for extension is granted, subsection 1 does not apply until the period of extension expires.

Idem

(3) Where the limitation period prescribed by law has expired and an application for extension is granted, the cause of action upon which the action was based is revived and subsection 1 does not apply until the period of extension expires.

Allegation
of extinc-
tion
R.S.O. 1970,
c. 25

(4) Where in an action or in an arbitration to which *The Arbitrations Act* applies a question arises as to the extinction of a right or title, a party to the action or arbitration does not have the benefit of the extinction unless he pleads or otherwise specifically claims that the right or title has been so extinguished.

10. Where a cause of action for the conversion or detention of goods accrues to a person and afterwards, possession of the goods not having been recovered by him or by a person claiming through him, Conversion or detention of goods

- (a) a further cause of action for the conversion or detention of the goods; or
- (b) a new cause of action for damage to the goods; or
- (c) a new cause of action to recover the proceeds of a sale of the goods,

accrues to him or a person claiming through him, no action shall be brought on the further or new cause of action after the expiration of six years from the date on which the first cause of action accrued to the plaintiff or to a person through whom he claims.

11.—(1) Notwithstanding sections 3 and 9, where, upon the expiration of the limitation period fixed by this Act with respect to an action on a judgment, there is an enforcement process outstanding, the judgment creditor or his successors may, Completion of enforcement process

- (a) continue proceedings on an unexpired writ of execution, but no renewal of the writ shall be permitted; or
- (b) continue proceedings in which a charging order is claimed.

(2) Where a court makes an order staying execution on a judgment, the running of time with respect to the limitation period fixed by this Act for actions on that judgment is postponed or suspended for so long as that order is in force. Orders staying executions
New.

12. Where any one or more of several persons entitled to any land or rent as co-tenants has or have been in possession or receipt of the entirety, or more than his or their undivided share or shares of the land, or of the profits thereof, or of the rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be considered to have been the possession or receipt of, or by the last-mentioned person or persons or any of them. R.S.O. 1970, c. 246, s. 11, *amended.* Possession of one co-tenant

The Crown

13.—(1) In this section, “the Crown” means the Crown in right of Ontario, and, in so far as the legislative competency of the Legislature extends, includes the Crown in all its other capacities.

Crown bound
by Act

(2) Except as provided in subsections 3 and 4, this Act applies to actions by or against the Crown. *New.*

Exception
as to Crown
land

(3) The Crown may commence an action within thirty years after the cause of action arose but not thereafter to recover Crown lands.

Exception
to the
exception
as to vacant
Crown land

(4) Notwithstanding subsection 3, the Crown may commence an action at any time to recover any waste or vacant land of the Crown, whether surveyed or not, or lands included in any road allowance heretofore or hereafter surveyed and laid out, or any lands reserved or set apart or laid out as a public highway, where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body. R.S.O. 1970, c. 246, s. 16, *amended.*

Conflict
of laws

14. The Ontario law of limitations and the analogous law of any other province or territory of Canada, or of any state or country, shall be characterized as substantive law for the purposes of the application of the rules of the conflict of laws, whether or not the particular law bars the remedy or extinguishes the right.

Scope of
post-
ponement,
suspension
and
extension
provisions

15. The provisions of this Act respecting the postponement, suspension and extension of the time within which actions may be commenced apply to all special limitation periods contained in any other Act, unless the other Act expressly provides otherwise.

Prescriptive
rights
defined

16.—(1) In this section, a prescriptive right in or over land does not include a right arising by adverse possession.

Prescriptive
rights
abolished

(2) Subject to subsection 3, every method of acquiring a right in or over land by prescription is abolished and, without limiting the generality of the foregoing, the common law doctrine of prescription and the doctrine of the lost modern grant are abolished.

When
prescriptive
rights may
mature

(3) A prescriptive right may mature during the ten-year period commencing on the day that this section comes into force where the person claiming the right has enjoyed the use on which his claim is based,

(a) for the period that would have been required to establish such a right if the law of prescription existing immediately before this section comes into force had continued in force; or

(b) immediately before and continuously during the ten-year period.

(4) For the purpose of determining whether a person has a prescriptive right either at the time this section comes into force or in the ten-year period thereafter, the law of prescription as it existed immediately before this section comes into force shall continue in force except,

Deter-
mination
of prescript-
ive rights

(a) in so far as this section alters the length of the periods required to establish a prescriptive right; and

(b) in so far as there was any requirement that an action should be brought in order to ascertain the period of adverse use.

(5) In subsection 6, “conveyance” means a deed, transfer, vesting order, plan of expropriation, or any other instrument that effects a change of ownership of land, but does not include a mortgage or a will, and “conveyed” has a corresponding meaning.

“conveyance”
defined

(6) As soon as land to which a prescriptive right is attached is conveyed and the conveyance is registered, the prescriptive right ceases to exist unless it is expressly described in the conveyance and conveyed with the land. *New.*

Prescriptive
rights ended;
exception

17.—(1) Nothing in this Act revives any cause of action that is statute-barred at the time this Act comes into force.

Transitional
provisions

(2) Subject to subsections 1 and 3, this Act applies to causes of action that arose before as well as the causes of action that arose after this Act comes into force.

Idem

(3) If, with respect to a cause of action that arose before this Act comes into force, the limitation period provided by this Act is shorter than that which formerly governed that cause of action and will expire on or before two years from the day this Act comes into force, the limitation period governing that cause of action is the shorter of,

Idem

(a) two years from the date this Act comes into force; or

(b) the limitation period that formerly governed the cause of action.

Con-
firmations

(4) Subject to subsection 1, a confirmation effective under section 4 is effective whether given before or after this Act comes into force.

Rights to
land acquired
by adverse
possession
unaffected

(5) Nothing in this Act interferes with any right or title to land acquired by adverse possession before this Act comes into force.

R.S.O. 1970,
c. 246,
repealed

18.—(1) *The Limitations Act*, being chapter 246 of the Revised Statutes of Ontario, 1970, is repealed.

Special
limitation
provisions
repealed

(2) The following special limitation provisions are repealed:

1. Section 22 of *The Embalmers and Funeral Directors Act*, being chapter 144 of the Revised Statutes of Ontario, 1970.
2. Section 41 of *The Funeral Services Act, 1976*, being chapter 83.
3. Section 17 of *The Health Disciplines Act, 1974*, being chapter 74.
4. Section 146 of *The Highway Traffic Act*, being chapter 202 of the Revised Statutes of Ontario, 1970.
5. *The Highway Traffic Amendment Act, 1975 (No. 2)*, being chapter 37.
6. Section 58 of *The Mental Health Act*, being chapter 269 of the Revised Statutes of Ontario, 1970.
7. Section 9 of *The Mental Hospitals Act*, being chapter 270 of the Revised Statutes of Ontario, 1970.
8. Section 17 of *The Motor Vehicle Accident Claims Act*, being chapter 281 of the Revised Statutes of Ontario, 1970.
9. Section 14 of *The Motor Vehicle Accident Claims Amendment Act, 1973*, being chapter 13.
10. Subsection 2 of section 427 of *The Municipal Act*, being chapter 284 of the Revised Statutes of Ontario, 1970.

11. Subsection 1 of section 30 of *The Ontario Mental Health Foundation Act*, being chapter 322 of the Revised Statutes of Ontario, 1970.
12. Section 51 of *The Private Sanitaria Act*, being chapter 363 of the Revised Statutes of Ontario, 1970.
13. Section 11 of *The Public Authorities Protection Act*, being chapter 374 of the Revised Statutes of Ontario, 1970.
14. Subsections 1 and 2 of section 1 of *The Public Authorities Protection Amendment Act, 1976*, being chapter 19.
15. Section 37 of *The Public Hospitals Act*, being chapter 378 of the Revised Statutes of Ontario, 1970.
16. Section 19 of *The Public Hospitals Amendment Act, 1972*, being chapter 90.
17. Section 12 of *The Public Officers Act*, being chapter 382 of the Revised Statutes of Ontario, 1970.
18. Subsection 5 of section 30 of *The Public Transportation and Highway Improvement Act*, being chapter 201 of the Revised Statutes of Ontario, 1970.
19. Section 32 of *The Public Utilities Act*, being chapter 390 of the Revised Statutes of Ontario, 1970.
20. Section 13 of *The Radiological Technicians Act*, being chapter 399 of the Revised Statutes of Ontario, 1970.
21. Section 86 of *The Telephone Act*, being chapter 457 of the Revised Statutes of Ontario, 1970.
22. Subsection 5 of section 38 of *The Trustee Act*, being chapter 470 of the Revised Statutes of Ontario, 1970.
23. *The Trustee Amendment Act, 1975*, being chapter 39.
24. Section 17 of *The Veterinarians Act*, being chapter 480 of the Revised Statutes of Ontario, 1970.

R.S.O. 1970,
c. 164, s. 5,
amended

(3) Section 5 of *The Fatal Accidents Act*, being chapter 164 of the Revised Statutes of Ontario, 1970, as re-enacted by the Statutes of Ontario, 1975, chapter 38, section 1, is amended by striking out "and no such action shall be brought after the expiration of two years from the death of the deceased" in the second, third and fourth lines.

R.S.O. 1950,
c. 331,
s. 267 (1),
repealed

(4) Subsection 1 of section 267 of *The Railways Act*, being chapter 331 of the Revised Statutes of Ontario, 1950, is repealed.

Commence-
ment

19. This Act comes into force on the 1st day of January, 19____.

Short title

20. The short title of this Act is *The Limitations Act*.

Complementary Legislation

Avoiding the Hardship of Notice of Claim Provisions

The Ontario Law Reform Commission recommended that the notice of claim provisions in five Ontario statutes be amended so that undue hardship could be avoided. A notice of claim is, in effect, a limitation within a limitation period. At present, if a plaintiff fails to give proper notice of claim, his lawsuit may be barred. The five notice of claim provisions that the Commission recommended be amended presently apply as follows:

1. An action against the Crown shall not be brought
 - (a) under s.30(4) of *The Public Transportation and Highway Improvement Act*, R.S.O. 1970, c.201 for failure to repair a highway, unless a notice of claim is given within 10 days of the damage; and,
 - (b) under s.7(3) of *The Proceedings Against the Crown Act*, R.S.O. 1970, c.365 for damages based on occupier's liability, unless a notice of the claim is served on the Crown within ten days after the claim arose;
2. An action against municipalities shall not be brought under s.427(1) of *The Municipal Act*, R.S.O. 1970, c.284, for failure to repair a highway or bridge, unless a notice of claim is given within,
 - (i) 10 days in the case of a county or township, and
 - (ii) 7 days in the case of an urban municipality,after the injury happened (s.427(5));
3. An action in respect of frequency change-overs under ss.25 to 28 of *The Power Corporation Act*, R.S.O. 1970, c. 354, unless a notice of claim is given within 90 days after the cause of action arose (s.32(2)); and
4. An action for libel in a newspaper or broadcast shall not be brought unless a notice of claim is given within six weeks after the alleged libel comes to the knowledge of the potential plaintiff, s.5(1) of *The Libel and Slander Act*, R.S.O. 1970, c.243.

After each notice of claim requirement in these statutes, it is proposed that a provision be included to the effect that:

Failure to give or the insufficiency of the notice of claim is not a bar to the action if the judge before whom the action is tried, or, if on a preliminary application, a judge of the court in which the action is pending, is of the opinion that the defendant was not prejudiced by the want or insufficiency of the notice and that an injustice would result if the action were barred.

Other Proposed Amendments to The Libel and Slander Act

In addition to a provision to relieve against hardship resulting from a failure to give a notice of claim, discussed above, it is proposed that the period during which notice of claim can be given be extended from six weeks to

three months to bring it into line with similar provisions in other legislation.

Section 6 of *The Libel and Slander Act* presently imposes a limitation period of three months for libel in a newspaper or in a broadcast. As recommended by the Ontario Law Reform Commission, it is proposed that the provision be repealed so that the two-year limitation contained in section 3(1) (c) of the Draft Proposed *Limitations Act* would be applicable.

Ontario Law Reform Commission: Report on Limitation of Actions, 1969

SUMMARY OF RECOMMENDATIONS

- A. GENERAL
- B. THE PERIODS RECOMMENDED
- C. THE RUNNING OF TIME
- D. MISCELLANEOUS
- E. SPECIAL LIMITATION PERIODS
- F. PRESCRIPTIVE EASEMENTS AND PROFITS-À-Prendre

The recommendations of the Commission are set out below. The page at which each recommendation may be found in the body of the Report is indicated.

A. GENERAL

1. *The Limitations Act* should be replaced with a statute that is contemporary both in language and substance. (p. 174)
2. (a) As a general principle, the bringing of every kind of action should be subject to some specific limitation period;
(b) The statute proposed by the Commission should establish limitation periods for all causes of action, except for:
 - (i) those actions which the Commission later recommends should remain the subject of special provisions imposed by other statutes, and
 - (ii) proceedings by way of judicial review of the exercise of statutory powers. (p. 23)
3. With respect to all causes of action, the lapse of the specified limitation period without an action having been brought should have the effect of extinguishing the right instead of merely barring the remedy. (p. 133)

B. THE PERIODS PROPOSED BY THE COMMISSION

1. *General*

There should be four general limitation periods, as follows:

Six Years

All causes of action not otherwise provided for.

Twenty Years

Actions on judgments.

Ten Years

Actions:

- (a) on deeds,
- (b) to recover land,
- (c) with respect to charges on property, and
- (d) for serious breaches of trust.

Two Years

Actions for:

- (a) damages for injury to the person or property (whether based on contract, tort, or statutory duty),
- (b) malicious prosecution,
- (c) seduction,
- (d) defamation, and
- (e) the recovery of penalties imposed by statute. (pp. 31-32)

2. *Contracts and Torts*

Contracts and torts should be governed by the following limitation periods:

Two Years

- (a) Personal injury and property damage actions, whether or not such actions are based on contract, tort, or statutory or other legal duty,
- (b) Actions under *The Fatal Accidents Act*,
- (c) Malicious prosecution, false imprisonment, seduction and libel and slander actions.

Six Years

- (a) Actions for wrongful detention or conversion of personal property, and
- (b) All other actions in contract (except those arising out of deeds) and tort. (p. 42)

3. *Specialties and Recognizances*

- (a) Actions on recognizances should be subject to a six-year limitation period;
- (b) The term "specialty" should not be used in the proposed statute;
- (c) Actions for obligations arising out of statutes should be subject to a six-year limitation period; and
- (d) Actions arising out of deeds should be subject to a ten-year limitation period. (pp. 46-47)

4. *Judgments and Orders*

- (a) The twenty-year period for actions on judgments be retained;
- (b) Orders for the payment of money should be treated in the same way as judgments;
- (c) It should not be possible to sue on a judgment given in the Ontario courts for the purpose of obtaining a fresh judgment;
- (d) Once the twenty-year period has run, no further action should be taken on the judgment, unless there is at that time an unexpired writ of execution outstanding;
- (e) Once the twenty-year period has run, if there is an unexpired writ of execution outstanding, the judgment creditor should be able to, as he now can:
 - (i) continue to proceed on that unexpired writ, and
 - (ii) renew such a writ indefinitely;
- (f) Foreign judgments and orders should continue to be governed by a six-year period and not be treated in the same way as local judgments: for clarification, however, the proposed statute should expressly exclude foreign judgments from the provision establishing a twenty-year period for local judgments and orders. (p. 51)

5. *Penalties*

- (a) All civil actions for the recovery of fines and penalties be subject to a two-year period;
- (b) The language of the provision replacing clauses (h) and (m) of section 45 (1) make clear that only fines and penalties are to be covered by it, the references to "damages or a sum of money given by any statute" to be omitted. (p. 53)

6. *Trusts*

- (a) All actions for breach of trust should be subject to some limitation period;
- (b) There should be no distinction made between different kinds of trusts (i.e., express, implied, resulting and constructive trusts should be treated in the same way);
- (c) Executors and administrators should be treated as trustees for the purposes of limitations;
- (d) Limitation periods should be applicable to actions as follows:

Ten Years

Actions against the personal representatives of a deceased person for a share of the estate, whether that person left a will or died intestate,

Actions in respect of any fraud or fraudulent breach of trust to which the trustee was party or privy,

Actions against a trustee for the conversion of trust property to his own use,

Actions to recover trust property, or property into which trust property can be traced, against a trustee or any other person,

Actions to recover money on account of a wrongful distribution of trust property, against the person to whom the property is distributed, or his successor.

Six Years

All other actions brought in respect of a breach of trust for which a period of limitation is not prescribed by some other provision of the proposed statute.

- (e) Time should not run against a beneficiary with respect to an action
 - (i) based on any fraud or fraudulent breach of trust to which the trustee was a party or privy, or
 - (ii) to recover from the trustee trust property, or the proceeds thereof, in the possession of the trustee, or previously received by the trustee and converted to his own use,

until the beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action would be based, the onus of proof of which should rest on the trustee.

Time should not run against a beneficiary in respect of a future interest in trust property until the interest becomes a present interest.

- (f) A statute-barred beneficiary should not be able to improve his position if another beneficiary, who is not statute-barred, makes a successful claim. (pp. 60-61)

7. *Recovery of Land and Charges on Property*

- (a) There should be separate provisions in the proposed statute dealing with actions:
- (i) to recover land, and
 - (ii) relating to charges on both real and personal property;
- (b) Actions relating to charges against real and personal property should include any proceedings to:
- (i) enforce a rent charge,
 - (ii) enforce a mortgage by foreclosure, by exercising a power of sale, taking possession or any other means,
 - (iii) enforce a contract for the conditional sale of goods by seizure or otherwise,
 - (iv) enforce an agreement for the sale of land,
 - (v) enforce a lien,
 - (vi) redeem mortgaged property in the hands of a mortgagee,
 - (vii) enforce a purchaser's right under a contract for the conditional sale of goods or an agreement for the sale of land;
- (c) Actions to recover land and relating to charges on both real and personal property should be subject to a ten-year limitation period (as is the case at present with respect to actions brought under sections 4, 19 and 23 of *The Limitations Act*);
- (d) Where the property subject to the charge is an unmatured life insurance policy, time should not begin to run until the policy has matured;
- (e) In any action or proceeding, no more than six years arrears of:
- (i) interest, whether owing in respect of a charge on property or not, or
 - (ii) rent,
- should be recoverable;

- (f) The rules which entitle a mortgagee to payment of statute-barred arrears of interest in redemption actions or out of the proceeds of sale of the mortgaged property should be abolished.
(pp. 72-73)

8. *"Catch-all" Provision*

All causes of action should be subject to a six-year limitation period except where the proposed statute, or some other statute, has otherwise prescribed.
(p. 63)

C. THE RUNNING OF TIME

1. *Accrual of Actions*

In cases which are based on breach of a duty to take care, whether the duty arises in tort, contract or by statute, time should run from the occurrence of damage.
(pp. 92-93)

2. *Postponement*

(a) *Absence from Jurisdiction*

No provision should be made to postpone or suspend the running of time in the absence from the jurisdiction of either a potential plaintiff or a potential defendant.
(pp. 94, 96)

(b) *Disabilities: Infancy and Mental Incapacity*

- (i) There should be one general provision relating to disabilities which would apply to all causes of action;
- (ii) The running of time should be suspended, whether or not the disability existed at the time the cause of action accrued to that person;
- (iii) Time should begin to run against a person when he ceases to be under a disability on the following basis:

The person would then be entitled to the longer of either:

- (a) the period which he would have had to bring his action had he not been under a disability, running from the time that the cause of action arose, or
- (b) such period running from the time that the disability ceased except that in no case should that period extend more than six years beyond the cessation of disability;
- (iv) the provision recommended above with regard to disability should not apply where:
 - (a) an infant is in the custody of a parent or guardian,
or

- (b) the affairs of a person of unsound mind are being administered by a committee or the Public Trustee,

except where an action is being brought by the infant against such parent or guardian or by the person who was of unsound mind (or on his behalf, if he is still of unsound mind) against such committee or the Public Trustee;

- (v) The onus of showing that a person is entitled to the benefit of the disability provision should rest on the person claiming that benefit;
- (vi) "Disability" should be defined in such a way as to extend the meaning of "unsound mind" to all situations where a person cannot manage his affairs because of any disease or any impairment of his physical or mental condition;
- (vii) In land actions, the maximum period of twenty years for bringing actions, when disabilities are being taken into account, should be retained. (pp. 99-100)

(c) *Absence of Knowledge*

1. *General*

- (a) There should be an extension procedure where the plaintiff is not aware that he has a cause of action;
- (b) The extension procedure should only be applicable to:
 - (i) Personal injury actions,
 - (ii) Property damage actions, and
 - (iii) Professional negligence actions not covered by (i) and (ii);
- (c) The extension should be granted where a potential plaintiff was unaware of material facts which, if he were a reasonable person knowing those facts and having obtained appropriate advice with respect to them, would have been of a decisive character in determining that he had an action,
 - (i) which would have a reasonable prospect of succeeding, and
 - (ii) result in the award of damages sufficient to justify bringing it;

- (d) Applications for extension should be made to the court which would have jurisdiction over the action and should be required to be made within twelve months from the time the potential plaintiff became aware of the relevant material facts;
- (e) Notice of such an application should be served on the potential defendant. (pp. 108-109)

2. *Fraud and Mistake*

- (a) There should be one general provision dealing with the postponement of time in fraud and mistake cases;
- (b) Such a provision should apply where:
 - (i) an action is based on fraud or deceit,
 - (ii) a right of action, or the identity of the person against whom the action lies, is fraudulently concealed, and
 - (iii) an action is for relief from the consequences of a mistake;
- (c) In such cases, time should not begin to run until the plaintiff has discovered the fraud, deceit, fraudulent concealment or the mistake, as the case may be, or could with reasonable diligence have discovered it;
- (d) Such a provision should not operate to the detriment of a *bona fide* purchaser for value. (p. 111)

(d) *Pleading and Procedural Problems*

- (i) *Set-offs, Counterclaims, Adding of Parties, and Tortfeasors' Claim for Contribution*
 - (a) Any claim by way of set-off, counterclaim, the adding of parties under Rule 136, or third party proceedings shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is made, or the parties added under Rule 136, or the third party proceedings are taken; and
 - (b) Section 9 of *The Negligence Act* should be repealed and a similar provision should be included in the proposed statute. (p. 113)

(ii) *Amendment of Pleadings*

In any action, the court should be able to allow the amendment of any pleading or other proceedings, or an application for a change of party, upon such terms as to costs or otherwise as the court deems just, notwithstanding that, between time of the issue of the writ and the application for amendment or change of party, a fresh cause of action disclosed by the amendment or the cause of action against the new party would have been barred by a limitation provision. (p. 115)

(e) *Acknowledgment and Part Payment*

- (i) There should be one general provision dealing with acknowledgment;
- (ii) Acknowledgment (including a part payment) should start time running afresh where time has not yet lapsed and there is a right:
 - (a) to recover any liquidated sum,
 - (b) to recover land, and
 - (c) with respect to charges on property,
 - (i) to enforce the charge, or
 - (ii) to obtain relief from the enforcement of the charge;
- (iii) An acknowledgment (including a part payment) to be effective must in all cases be given by the person liable or his agent to the person entitled to the right or his agent;
- (iv) An acknowledgment, other than a part payment, must be in writing and signed by the person (or his agent) making the acknowledgment;
- (v) It should not be necessary to show a promise to pay; and
- (vi) No change should be made in the Ontario rule that an acknowledgment (including a part payment) by one co-debtor does not bind another co-debtor. (p. 125)

D. MISCELLANEOUS RECOMMENDATIONS

1. *Equitable Defences*

- (a) Acquiescence should remain available as a defence to the extent that it now is;

- (b) Laches should only be available as a defence with respect to those claims for equitable relief in aid of a legal right which may now be defeated by laches. (p. 23)

2. *Conflict of Laws*

The proposed statute contain a provision that Ontario limitations laws and the analogous law of any other province, or of any state or country, shall be classified as substantive law for the purposes of private international law (conflict of laws), whether or not the particular law bars the remedy or extinguishes the right. (p. 136)

3. *The Crown*

- (a) (i) The proposed statute should apply to proceedings by and against the Crown in the same way as it applies with respect to ordinary persons, except with respect to actions to recover Crown lands,
- (ii) Actions to recover Crown lands should be subject to a limitation period of thirty years, although the present exceptions contained in section 16 of *The Limitations Act* should be retained.
- (b) The proposed statute should apply not only to the Crown in right of Ontario but also, so far as the legislative power of the province permits, the Crown in all its other capacities. (p. 140)

E. SPECIAL LIMITATION PERIODS

1. The following special limitation provisions should be repealed:

- (a) s. 147 of *The Highway Traffic Act*,
- (b) s. 17 of *The Motor Vehicle Accident Act, 1961-62*,
- (c) s. 33 (5) of *The Highway Improvement Act*,
- (d) s. 443 (2) of *The Municipal Act*,
- (e) s. 43 of *The Medical Act*,
- (f) s. 29 of *The Dentistry Act*,
- (g) s. 57 of *The Pharmacy Act*,
- (h) s. 13 of *The Radiological Technicians Act*,
- (i) s. 18 of *The Veterinarians Act*,
- (j) s. 21 of *The Embalmers and Funeral Directors Act*,
- (k) s. 49 of *The Private Sanitoria Act*,
- (l) s. 33 of *The Public Hospitals Act*,

- (m) s. 53 of *The Sanatoria for Consumptives Act*,
 - (n) s. 58 of *The Mental Health Act, 1967*,
 - (o) s. 10 (2) of *The Mental Hospitals Act*,
 - (p) s. 12r (1) of *The Ontario Mental Health Foundation Act, 1960-61*,
 - (q) s. 11 of *The Public Authorities Protection Act*,
 - (r) s. 12 of *The Public Officers Act*,
 - (s) s. 86 of *The Telephone Act*,
 - (t) s. 32 of *The Public Utilities Act*,
 - (u) s. 267 (1) of *The Railways Act*,
 - (v) s. 6 of *The Libel and Slander Act*,
 - (w) s. 5 of *The Fatal Accidents Act*, and
 - (x) s. 38 (4) of *The Trustee Act*;
2. The proposed limitation statute should expressly provide that actions brought under *The Fatal Accidents Act* be governed by the two-year period, with time running from the date of death;
 3. The proposed limitation statute should expressly provide that actions brought against the Registrar under *The Motor Vehicle Accident Claims Act, 1961-62* be governed by the two-year period;
 4. The time for giving the notice required by section 5 (1) of *The Libel and Slander Act* should be increased to three months;
 5. In respect of the following notice of claim provisions, failure to notify within the required time should not be a bar to the bringing of an action if in the opinion of a judge (either the judge before whom the action is tried or a judge on a preliminary application) such a result would be unjust:
 - (a) s. 33 (4) of *The Highway Improvement Act*,
 - (b) s. 6a (3) of *The Proceedings Against the Crown Act*,
 - (c) s. 443 (5) of *The Municipal Act*,
 - (d) s. 32 (2) of *The Power Commission Act*, and
 - (e) s. 5 (1) of *The Libel and Slander Act*.
 6. The provisions of the proposed statute regarding the postponement, suspension and extension of time should apply to all special limitation periods that remain unrepealed, unless the statutes creating those special limitation periods expressly provide otherwise. (pp. 84-85)

F. PREScriptive EASEMENTS AND PROFITS-À-PRENDRE

1. Except for the transitional period recommended below, the right to acquire easements and *profits-à-prendre* by prescription in the future should be abolished, by
 - (a) declaring by statute that the doctrine of the lost modern grant is no longer part of the law of Ontario; and
 - (b) repealing sections 30 to 35, and 39 to 41 of *The Limitations Act* and not replacing these provisions in any new limitations statute.
2. Prescriptive easements and *profits-à-prendre* should be capable of creation during a ten-year transitional period on the following basis:
 - (a) as soon as the person having the benefit of the adverse enjoyment has the required period of enjoyment under the existing law,
 - (b) at the end of the transitional period, if there has been continuous adverse enjoyment for at least ten years, but insufficient length of enjoyment under the existing law.
3. If the recommendation of abolition is implemented, then the requirement for an action provided for by section 32 of *The Limitations Act* should not apply to persons,
 - (a) having, at the time of abolition, the required adverse enjoyment under the present law, and
 - (b) acquiring, during the transitional period, the required adverse enjoyment under the transitional provisions.
4. (1) Prescriptive easements and *profits-à-prendre* should lapse two years after the end of the transitional period, unless the persons entitled to their benefit have filed a judgment or notice of claim in the appropriate registry or land titles office, such judgment or notice to be entered on the records relating to the appropriate servient tenement. Notification of the registration of any such notice of claim should be given to the owner of the servient land.
- (2) Where a person has failed to file his judgment or notice in time, he should be able to apply to a judge of the county or district in which any of the relevant lands are situated for an extension of time on the grounds of substantial hardship. The extension should only be granted:
 - (a) if the applicant is able to demonstrate that the loss of enjoyment would result in substantial hardship, and
 - (b) if the applicant had been unaware of the registration requirement during the registration period. (pp.160-161)

Synopsis of Major Departures from the Ontario Law Reform Commission Recommendations

1. Changes Regarding Limitation Periods Proposed by the Ontario Law Reform Commission

Most of the time periods recommended by the Ontario Law Reform Commission have been implemented in the draft legislation. A few have been altered.

(a) Actions on Judgments and Orders

The Ontario Law Reform Commission recommended a twenty-year limitation period should govern actions on judgments and orders. At page 164 of the Summary the following scheme is set out:-

- (a) the twenty-year period for actions on judgments be retained;
- (b) orders for the payment of money should be treated in the same way as judgments;
- (c) it should not be possible to sue on a judgment given in the Ontario courts for the purpose of obtaining a fresh judgment;
- (d) once the twenty-year period has run, no further action should be taken on the judgment, unless there is at that time an unexpired writ of execution outstanding;
- (e) once the twenty-year period has run, if there is an unexpired writ of execution outstanding, the judgment creditor should be able to, as he now can:
 - (i) continue to proceed on that unexpired writ,
 - (ii) renew such writ indefinitely.

This proposal is similar to the existing law and is clearly workable. The Law Reform Commission of British Columbia after studying it recommended that another scheme apply to orders and judgments and made the following recommendation, at page 37 of their Report:

- 1. Judgments be subject to some limitation period.
- 2. Orders be treated in the same way as judgments.
- 3. The appropriate limitation period for actions and proceedings on judgments be ten years, except that there should be no limitation with respect to the enforcement of injunctions, restraining orders, and similar permanent prohibitions and judgments for possession of land.
- 4. The judgment creditor be permitted to preserve his right by commencing a fresh action on the judgment within the limitation period.
- 5. Once the ten-year period has run, if there is enforcement process outstanding, the judgment creditor be able to
 - (a) continue to proceed on an unexpired writ of execution provided writs of possession and delivery are brought within the definition of "writs of execution" but no renewals of such writs of execution should be permitted;

- (b) in the case of charging orders, continue proceedings to the point of making the charging order absolute, in which case the time limit for the enforcement of charges against personalty will be appropriate and should be made applicable with time beginning to run from the making absolute of the charging order . . .

The 1975 British Columbia Limitations Act implemented the recommendations of the British Columbia Commission. The British Columbia legislation also appears workable. While there is no inherent advantage in choosing the British Columbia scheme over that proposed by the Ontario Commission, a large measure of uniformity amongst Canadian jurisdictions can be attained by choosing the British Columbia approach. *The Uniform Limitation of Actions Act*, which has been adopted in four provinces (Manitoba, Saskatchewan, Alberta and Prince Edward Island) and both territories provides for a ten-year period for judgments and orders. If Ontario opts for such an approach, eight of the twelve Canadian jurisdictions will have uniformity in this regard.

The following provisions of the Draft Proposed Act implement the decision to follow the British Columbia proposals. Section 3(2) (f) provides for a ten-year limitation to be applicable on a judgment for the payment of money or the return of personal property. Judgment is defined in section 1 to include an order. Section 3(3) provides that no limitation applies to

- (a) an action relating to the enforcement of an injunction or a restraining order;
- (e) an action for a declaration as to personal status;
- (f) an action for or declaration as to the title of property by any person in possession of that property.

Section 11(1) provides for the completion of enforcement of an outstanding enforcement proceeding and section 11(2) provides that time should not run against the judgment creditor where the judgment debtor has obtained a stay of execution.

(b) Actions on Deeds

Actions on deeds may either be treated as an ordinary contract action or may be given a longer limitation period. After full discussion, the Ontario Law Reform Commission concluded that there were good but not compelling reasons for either choice, and on balance the limitation period applicable to actions on deeds should be ten years rather than the six-year period for contracts not under seal.

The Law Reform Commission of British Columbia recommended that deeds be treated for limitation purposes the same as contracts not under seal and the 1975 British Columbia *Limitations Act* implements that recommendation. *The Uniform Limitations of Actions Act*, adopted by four provinces and the two territories provides for a six-year period for both deeds (specialties) and contract. Once again, we believe that in the absence of strong reasons to the contrary, the arguments in favour of uniformity of limitations legislation should prevail and that the six-year period should apply to both deeds and contracts not under seal. However, if good reasons are found for retaining a ten-year limitation period for ac-

tions with respect to charges on both real and personal property, a ten-year period should be applied to deeds.

As a consequence of the tentative decision to adopt a six-year period for deeds, there is no specific provision governing deeds in the Draft Act. They would fall under the six-year period by virtue of section 3(4) which establishes a six-year limitation for all actions not specifically provided for in the Act.

(c) Actions with Respect to Charges on Both Real and Personal Property

The Ontario Commission recommended “That actions . . . relating to charges on both real and personal property should be subject to a ten-year limitation period”. This position is consistent with the Ontario Law Reform Commission’s treatment of deeds, that is, contracts under seal, for which they also recommended a ten-year period. Where a lending transaction involves the taking of collateral, the transaction is usually formalized in a contract under seal, that is, a deed. The personal action on the covenant in the deed should be governed by the same limitation period which is applicable to an action to realize on the security.

The British Columbia Commission ultimately recommended and the 1975 British Columbia *Limitations Act* implements a six-year period for debts whether or not security in the form of real or personal property or both is taken. This too is consistent with the approach the British Columbia Commission took to deeds for which the six-year period is applicable. Before the British Columbia Commissioners recommended the six-year period for actions with respect to charges on real and personal property, it sought comment from the legal profession and from the financial community. From the response they determined that there was no strong reason for treating a secured debt differently from an unsecured debt for the purpose of the limitation of actions.

To implement the tentative decision in favour of the six-year period, section 3(5) specifically provides that the six-year limitation applies to:

- (a) an action by a second party not in possession of collateral to realize on that collateral;
- (b) an action by a debtor not in possession of collateral to redeem that collateral.

2. Postponement of Running of Time

(a) Disabilities: Infancy and Incapacity

The Law Reform Commission of British Columbia agreed with most of the recommendations of the Ontario Law Reform Commission regarding postponement of the running of time for disabilities. The 1975 British Columbia *Limitations Act* implements these recommendations. However, the following recommendation set out at pages 167-8 of the Summary was not implemented:

- (iv) the provision recommended above (which would postpone or suspend the running of time during a disability) with regard to disability should not apply where:

- (a) an infant is in the custody of a parent or guardian, or
- (b) the affairs of a person of unsound mind are being administered by a committee or Public Trustee.

(except where an action is being brought by the infant against such parents or guardian or by the person who was of unsound mind or on his behalf, if he is still of unsound mind, against such committee or the Public Trustee.)

In disagreeing with this recommendation the British Columbia Law Reform Commission states (p.70):

This commission does not find the approach of the Ontario Law Reform Commission wholly satisfactory on this point, especially regarding the position of minors. We would be loath to see the way open for a parent to seriously impair the rights of a child because he, for any one of a variety of reasons, might be unwilling to prosecute an action on behalf of that child. The position is less serious in the case of a committee who is in a fiduciary relationship to the patient and so may be more easily called to account for his acts or omissions than a parent. On the other hand, one can appreciate the thinking behind the Alberta legislation and the recommendations of the Ontario Law Reform Commission. Actions should be brought expeditiously and a defendant should not be prejudiced by unnecessary delays.

A most satisfactory solution with regard to persons of unsound mind was evolved by the Law Reform Commission of New South Wales. They recommended that a person against whom a cause of action might lie may give a notice to proceed to a curator of a mentally unsound plaintiff. Once that notice has been given, the plaintiff ceases to be protected by the disability and time begins to run against him. Such a scheme gives the defendant the benefit of the limitation period if he wishes it, and brings home forcefully to the curator the fact that some sort of action is required.

There seems to be no reason why such a scheme could not be extended to the situation where the plaintiff is a minor. It would seem reasonable to permit a potential defendant to start time running against a minor by delivering a notice to proceed to the parent or guardian having custody of that minor. That scheme could be supplemented even further to deal with the parent or committee who refuses to commence proceedings in circumstances where a reasonable man would. It is suggested that in every case in which a notice to proceed is delivered, a copy also be served on the Public Trustee. That and no more might have a beneficial effect. The knowledge that the rights of the disabled party have come under the eye of a public official may, in itself, encourage parents and committees to act reasonably where they might not otherwise do so.

We would, however, go one step further and suggest that in every case where a notice to proceed has been served and the parent or the committee has failed to commence an action or take other steps to pursue the claim in reasonable time, the Public Trustee should be required to investigate the situation. If satisfied that the disabled plaintiff has a good cause of action which should reasonably be pursued, he should commence an action on behalf of that plaintiff. Appropriate amendments to *The Official Guardian Act* would achieve this end. Although the foregoing scheme might be regarded as cumbersome, we feel it would provide a just and satisfactory balance of interests of plaintiff, defendant, and society.

We agree with the position taken by the Law Reform Commission of British Columbia. Consequently, sections 7(6) to 7(14) of the Draft Proposed Act provide for a notice to proceed.

(b) Absence of Knowledge

The Ontario Law Reform Commission, like other commissions which have recently studied the limitation of actions, recognized the acute hardship that can result when a limitation period runs against a person who is not aware that he has a cause of action. The Ontario Commission made the following recommendations:

- (a) There should be an extension procedure where the plaintiff is not aware that he has a cause of action;
- (b) The extension procedure should only be applicable to:
 - (i) Personal injury actions,
 - (ii) Property damage actions,
 - (iii) Professional negligence actions not covered by (i) and (ii);
- (c) The extension should be granted where a potential plaintiff was unaware of material facts which, if he were a reasonable person knowing those facts and having obtained appropriate advice with respect to them, would have been of a decisive character in determining that he had an action,
 - (i) which would have a reasonable prospect of succeeding, and
 - (ii) result in the award of damages sufficient to justify bringing it;
- (d) Applications for extension should be made to the court which would have jurisdiction over the action and should be required to be made within twelve months from the time the potential plaintiff became aware of the relevant material facts;
- (e) Notice of such an application should be served on the potential defendant.

There is general agreement among Canadian jurisdictions that there should be provision for cases where the plaintiff is not aware that he has a cause of action and that the extension procedure should be limited to personal injury actions, property damage actions, and professional negligence actions. The model for the type of extension provision recommended by the Ontario Law Reform Commission is the English *Limitation Act, 1963*. This is an extension provision which requires that a motion to extend be heard by the court. The English Law Commission recently reported that the existing 1963 provision does not operate successfully and recommended its repeal. In 1968 the Alberta Uniformity Commissioners in a report to the Uniform Law Conference rejected the English legislation. After considering the English Act of 1963 and its application as reflected in the recited cases, the Commissioners concluded:

In our opinion, it will be more satisfactory to include a section analogous to the concealed fraud section so as to provide that in cases of bodily damages, property damage and professional negligence, time shall begin to run when the plaintiff has discovered the damage (or perhaps when he reasonably could have discovered it).

The approach of the Alberta Commissioners has found favour in the British Columbia Report and with great elaboration is found in the British Columbia legislation of 1975. The simplicity of the Alberta approach was enticing to the Ontario Reform Law Commission (Ontario Report p.108), although not recommended by it. We believe the Alberta Commissioners were right and rather than provide for an extension procedure have included the absence of knowledge situation with the general provision dealing with the postponement of time in fraud and mistake cases. These are sections 6(3) to section 6(6) inclusive of the Draft Proposed Act.

3. An Ultimate Limitation

The Ontario Law Reform Commission did not recommend the provision of an ultimate limitation period. It did recommend that notwithstanding any disability, confirmation, or postponement of the running of time in an action against land, the maximum period of twenty years for bringing actions, when disabilities are being taken into account, should be retained. The New South Wales Law Reform Commission and Law Reform Commission of British Columbia both recommended that after thirty years has expired an action should be statute barred, notwithstanding any disability, confirmation, fraud, or lack of knowledge of the cause of action.

The notion of an ultimate limitation period is not a complete innovation. Section 37 of the existing *Limitations Act* provides that, notwithstanding a continuing disability or succession of disabilities, no action shall be brought to recover land after twenty years from the time the right accrued. We believe that an ultimate limitation is desirable. A statute of limitation has been referred to as “an Act of peace”. An ultimate bar is in accordance with the purpose of limitation legislation: that at some point in time the possibility of litigation should be dead. The British Columbia Law Reform Commission recommended:

The proposed statute contain an ultimate limitation period of thirty years, beyond which no action (except those actions which should be subject to no limitation period at all) may be brought, notwithstanding any disability, confirmation, or postponement of the running of time.
(British Columbia Report p.101)

We agree that it is desirable to have an ultimate limitation period and section 8 of the Draft Proposed Act implements this recommendation.

